

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MASTEC NORTH AMERICA, INC.

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 488, AFL-
CIO

Case 34-CA-090246

RESPONDENT MASTEC, NORTH AMERICA INC.'S
REPLY BRIEF TO THE NATIONAL LABOR RELATIONS BOARD

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I. INTRODUCTION

Respondent MasTec North America, Inc. (“MasTec” or “Respondent”) submits the following reply brief in further support of its response to the National Labor Relations Board’s (“Board”) November 17, 2014 Order Approving Stipulation, Granting Motion, and Transferring Proceeding To The Board. For the reasons discussed herein, as well as Respondent’s initial brief, Respondent’s Dispute Resolution Policy (“DRP”), Tape Recording Policy, and rule prohibiting “use of abusive, threatening or derogatory language towards employees, customers or management” (“Language Policy” or “LP”) do not violate the Act.

The General Counsel’s initial brief fails to substantiate the Complaint’s allegations. General Counsel’s reliance on the Board’s decisions in *D.R. Horton*, 357 NLRB No. 184 (2012) *enf’d. den.* 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil, USA Inc.*, 361 NLRB No. 72 (2014) is misplaced because the Board’s holdings in these cases are inconsistent with Supreme Court jurisprudence and the rationale of those decisions has been overwhelmingly rejected by courts that have reviewed them, including from the United States Court of Appeals for the Second Circuit where this case geographically lies. Therefore, to the extent the Board relies on either of these decisions in the instant case, an appellate court will not afford the decision any deference. Moreover, even presuming these cases could withstand judicial scrutiny, they are not controlling because, unlike the situations in *D.R. Horton* or *Murphy Oil*, the DRP contains a lawful opt-out provision. Further, the General Counsel has failed to show how the Tape Recording Policy or LP could be construed to restrict employees’ Section 7 rights, especially where Respondent has established legitimate reasons for maintaining both rules.

Accordingly, for the reasons set forth below and in Respondent’s initial brief, the General Counsel’s Complaint should be dismissed in its entirety.

II. RESPONDENT'S MAINTENANCE OF THE OPTIONAL DRP DOES NOT VIOLATE THE NLRA

Respondent's DRP is lawful because the class action waiver contained therein and requirement that certain employment related disputes be arbitrated on an individual basis simply do not interfere with the Section 7 rights of employees. The General Counsel contends that *D.R. Horton, Inc.*, 357 NLRB at No. 184 and *Murphy Oil USA, Inc.*, 361 NLRB at No. 72 are controlling in this matter because "none of the Supreme Court's class-action waiver jurisprudence under the FAA addresses a case in which the fundamental statutory protection is the right of employees to act as a group in improving their working conditions." (General Counsel's Brief, at 11).

The General Counsel is wrong. First, the General Counsel ignores, as irrelevant, recent decisions of the Supreme Court enforcing voluntary arbitration agreements, including employment arbitration agreements containing class action waivers, and upholding the rights of the parties to those agreements to "specify *with whom* [they] choose to arbitrate their disputes" and "the rules under which that arbitration will be conducted." See, e.g., *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (internal citations omitted). Additionally, for the reasons discussed on pages 6-9 of Respondent's initial brief, given the Supreme Court's recent decisions in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1748, 1751 (2011), *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012), and *Marmet Health Care Ctr. v. Brown*, 133 S. Ct. 1201 (2012), it cannot reasonably be argued that *D.R. Horton* and *Murphy Oil* are supportable. This is especially so in light of *American Express*, which held that arbitration agreements with class action waivers are enforceable under the FAA notwithstanding any policy arguments to the contrary. *American Express*, 133 S. Ct. at 2309. Rather, only a "contrary congressional command" in a particular statute can override the FAA's mandate that arbitration

agreements be enforced according to their terms. *Id.* As the analysis set forth herein and Respondent's initial brief demonstrates, no such "congressional command" exists in the NLRA.

In asserting according to *Murphy Oil*, that an employee's right to file a class action constitutes a non-waivable substantive right under Section 7, the General Counsel ignores that class actions, under Rule 23 of the Federal Rules of Civil Procedure, are only a procedural device which, as the Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear, cannot "abridge, enlarge or modify any substantive right." As such, the right to file a class action, like the choice of a judicial forum, can be voluntarily waived. *See, e.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (A class action only affects procedural rights and "leaves the parties' legal rights and duties intact"). If, as the Board and General Counsel have suggested, the NLRA "creates the core substantive right, not merely the procedural right, of employees to act in concert by pursuing joint, class, or collective claims without the interference of an employer-imposed restraint," (General Counsel Brief, at 11-12) Congress (or a state legislature) would have added Section 7 of the NLRA, either explicitly or by reference, into every single employment-related statute as well as every class/collective action procedural device (i.e. FRCP 23). It is because no such legislative intent exists that the Board's decisions in *D.R. Horton* and *Murphy Oil* are so fundamentally wrong and should be overruled.

Second, as the General Counsel concedes, the United States Court of Appeals for the Fifth Circuit in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) rejected the Board's analysis in *D.R. Horton*, on the grounds that such restrictions in an arbitration agreement are sanctioned by the Federal Arbitration Act ("FAA") and the NLRA does not trump the FAA with respect to the enforceability of such requirements. In addition, the General Counsel acknowledges that, in addition to the Fifth Circuit, the Second (where this case geographically

lies) and Eighth Circuits have deemed the Board's decision in *D.R. Horton* to be unpersuasive. See e.g. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-298, n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013)(described in detail in Respondent's initial brief, at 10-11).¹ Accordingly, to the extent that the Board relies upon either or both of these decisions in the instant case, it will not withstand appellate scrutiny.

Third, the General Counsel also has taken a very simplistic view of the Board's decisions in *Murphy Oil*, *D.R. Horton*, as well as Respondent's DRP. The General Counsel appears to be of the view that every arbitration agreement with a class action waiver is facially illegal and designed to trample on employees' Section 7 rights. Of course, the General Counsel ignores that if employees have a Section 7 right to pursue class litigation, they also have a Section 7 right to refrain from initiating or participating in class litigation.

That the NLRA preserves an employee's "freedom of choice" in voluntarily deciding for himself or herself to participate or not in a class action is explicitly recognized in *Salt River Valley Water Users' Assoc. v. NLRB*, 206 F.2d 325 (9th Cir. 1953), a case heavily relied on by the Board in both *D.R. Horton* and *Murphy Oil*. In *Salt River*, the Ninth Circuit held that employees have a Section 7 right to collect signatures on a petition authorizing the filing of a Fair Labor Standards Act collective action. In a part of the *Salt River* decision not cited by the

¹ See also *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) *cert denied* 134 S. Ct. 2886 (June 30, 2014) (citing the Fifth Circuit's decision with approval "that the National Labor Relations Act does not contain a contrary congressional command overriding the application of the FAA"). Further, in *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075, n.3 (9th Cir. 2013), *cert. denied* 135 S. Ct. 355 (2014), the United States Court of Appeals for the Ninth Circuit amended its earlier decision, reported at 734 F.3d 871, 873-874, n. 3 (9th Cir. 2013), to suggest that it was not deciding whether it would follow the Board's *D.R. Horton* rationale. However, the beginning of footnote 3 of the later reported decision, consistent with the earlier reported decision, implicitly suggests that the Ninth Circuit would not follow the Board's *D.R. Horton* analysis: "Without deciding the issue, we also note that the two courts of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB's decision in *D.R. Horton* on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act ('FAA')."

Board but no doubt pertinent to the “more difficult” question posed by it in *D.R. Horton’s* footnote 28,² the Ninth Circuit reversed a Board finding of an unfair labor practice against the employer for allegedly coercing an employee to remove his name from the petition and thus to refrain from participating in the proposed collective action. It did so because the employee had removed his name voluntarily and without coercion, and did not perceive the employer’s articulated displeasure with the petition as a “threat.” In other words, the Ninth Circuit recognized that the employee had simply exercised his right to refrain from participating in the proposed collective action. *Salt River*, 206 F.2d at 329. As found in *Salt River*, a voluntary agreement to arbitrate only individual claims, such as the DRP at issue here, is tantamount to an employee’s exercise of his or her right to “refrain” from participating in class action litigation and cannot, standing alone, give rise to an unfair labor practice.³

Fourth, the General Counsel also seeks to blot out the subtler shades of gray that can be discerned in footnote 28 of the Board’s decision in *D.R. Horton*. The General Counsel contends that the Supreme Court’s decision in *Eastex v. NLRB*, 437 U.S. 556, 565-566 (1978)

² Footnote 28 specifically explained:

we do not reach the more difficult questions of (1) whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration and (2) whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

In *Murphy Oil*, the Board did not disturb this finding. However, the General Counsel incorrectly contends that “the Board has held that such mandatory arbitration agreements, even with an opt-out provision, violate Section 8(a)(1). . . .” (General Counsel Brief, at 10). Although, as discussed *infra*, administrative law judges have addressed this issue, the Board itself has not yet ruled upon the legality of an opt-out provision in this context.

³ The General Counsel’s reliance upon *National Licorice Co. v. NLRB*, 309 U.S. 350, 354, 361 (1940) is misplaced. In *National Licorice Co.*, the Court noted that as a “means of thwarting the policy of the Act,” the company threatened employees that, if they did not sign individual contracts requiring them to waive the right to strike, their jobs, among other things, would no longer be protected. Unlike the present case, the Supreme Court found the contract in *National Licorice Co.* to be unenforceable because it encroached upon clearly defined rights in the workplace and evidenced the employer’s transparent effort to circumvent those rules.

“establishes that the right to engage in collective legal action in administrative and judicial forums is the core substantive right protected by the NLRA, and not merely a procedural right as the Fifth Circuit concluded in its *D.R. Horton* decision.” (General Counsel Brief, at 12). However, the U.S. Supreme Court in *Eastex* recognized only that the circuit courts construing Section 7 have found that employees are protected from employer “retaliation” when pursuing such relief in “administrative and judicial forums,” and left for a later day what constitutes “‘concerted activities’ in this context.” *Eastex*, 437 U.S. at 566, n. 15. Therefore *Eastex* is inapposite.

Fifth, equally unpersuasive is the General Counsel’s argument that Respondent’s DRP—which according to the U.S. Supreme Court is a dispute resolution mechanism to be promoted, not discouraged—is an illegal agreement or, worse yet, a “yellow dog contract.” General Counsel’s implicit suggestion that the Supreme Court is promoting “yellow dog contracts” in its recent seminal decisions by enforcing arbitration agreements and class action waivers demonstrates the fallacy of its argument. As one court has recently held, the Norris-LaGuardia Act (“NLGA”), 29 U.S.C. § 101, *et seq.*, upon which the General Counsel premises its argument, “specifically defines those contracts to which it applies [i.e., yellow-dog contracts]” and concluded “An agreement to arbitrate is not one of [them].” *Morvant v. P. F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. May 7, 2012) (citation omitted); *see also Ryan v. JPMorgan Chase & Co.*, 924 F. Supp. 2d 559, 565-566 (S.D.N.Y. 2013).

Sixth, the General Counsel also disregards that, in contrast to *D.R. Horton* and *Murphy Oil*, the DRP is not a mandatory program and clearly advises employees they may opt out of participation without fear of adverse employment consequences.

Critically, the opening sentence of the *D.R. Horton* decision states:

In this case, we consider whether an employer violates Section 8(a)(1) of the National Labor Relations Act *when it requires employees* covered by the Act, *as a condition of employment*, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.⁴

Id. Slip Op. at 1 (emphasis added); *see also Murphy Oil*, 361 NLRB at No. 72, Slip Op. at 14 (“What *D.R. Horton* prohibits is *unilateral action, by an employer*, that purports to completely deny access to class, collective, or group procedures that are otherwise available to them under statute or rule.”) (emphasis added). Thus, the purported interference with Section 7 rights found in *D.R. Horton* and *Murphy Oil* was the employer’s unilateral action in “requiring” an employee to enter into an arbitration agreement with a class action waiver, a requirement not present in MasTec’s DRP.

Finally, the General Counsel’s reliance upon the ALJ’s decision in *Domino’s Pizza*, 29-CA-103180 JD(NY) 15-14 (March 27, 2014) is erroneous.⁵ The concerns identified in that case – that employees who opt out of the voluntary arbitration program may be precluded from engaging in protected concerted activities with those employees who did not opt out and that the participatory choice employees make affects them in perpetuity – are wholly speculative. Moreover, an employee’s decision as to whether or not to opt-out of the DRP underscores the NLRA’s freedom of choice. This core right is underscored, where, as in this case, there is an express assurance by MasTec that no adverse employment consequences will flow from an employee’s decision to opt out of the DRP. *See e.g. Bloomingdales, Inc.*, 31-CA-071281, 2013 NLRB LEXIS 460, at *24 (June 25, 2013) (employer’s “opt-out procedure is sufficient to render the individual arbitration program voluntary” for purposes of *D.R. Horton*).

⁴ The Board in *D.R. Horton* explicitly did not address voluntary class action arbitration agreements. *See* 357 NLRB at No. 184, at n. 28.

⁵ *24 Hour Fitness Worldwide*, 20-CA-035419 JD(SF)-51-12, slip op. at 16-18 (Nov. 6, 2012) is similarly unpersuasive.

Accordingly, for the reasons discussed herein, as well as Respondent's initial brief, the General Counsel's claim that the DRP is unlawful should be dismissed.

III. RESPONDENT'S MAINTENANCE OF ITS TAPE RECORDING POLICY IS LAWFUL BECAUSE MASTEC HAS A LEGITIMATE INTEREST IN LIMITING SECRET RECORDINGS

The General Counsel offers a distorted view of the factors the Board considers in determining whether an employer's recording ban is lawful. The General Counsel contends that *Flagstaff Medical Center, Inc.* 357 NLRB No. 65 (2011) suggests that, "[i]n order to override employees' protected rights, the Board requires a 'weighty' employer interest." (General Counsel Brief, at 19). However, *Flagstaff Medical Center, Inc.* did not so hold. Instead, the Board merely noted that, in that case, there was a "weighty" privacy interest held by the employer's patients which justified the rule. *See* 357 NLRB No. 65 at Slip Op. at 6. In the present case, the General Counsel violates the Board's clear instructive that it "... must not presume improper interference with employee rights." *Id. citing Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

The General Counsel contends that the Tape Recording Policy "may be reasonably construed to prohibit the recording of statements, conversations, or activities that involve Section 7 rights, such as picketing, or recording evidence to be presented in administrative or judicial forums in employment-related matters." (General Counsel Brief, at 16). To support this meritless argument, the General Counsel relies upon *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), *enf'd.* 976 F.2d 743 (11th Cir. 1992) for the proposition that an "employee tape recording at jobsite for Department of Labor investigation [was] considered [engaged in] protected [activity]." (General Counsel Brief, at 16). However, in actuality, the ALJ in that case merely noted that "[t]here was no evidence presented by the [employer] that any of

these activities of [the employee] were in fact unprotected or violated any of [the employer's] valid policies." *Sullivan, Long & Hagerty*, 303 NLRB at 1013. Accordingly, the Board in *Sullivan, Long & Haggerty* never made an independent determination as to whether tape recording on the job site was protected activity. Moreover, the Board certainly never evaluated the legality of a rule prohibiting tape recording. This case is clearly inapposite.

Next, the General Counsel argues that *Whole Foods Market*, 13-CA-103533, 2013 NLRB LEXIS 677 (Oct. 30, 2013),⁶ a decision directly on-point finding a tape recording policy materially indistinguishable from MasTec's lawful, is erroneous because the ALJ did not "clarify or limit the types of conversations or events [the rule was] intended to cover." (General Counsel Brief, at 17). According to General Counsel, notwithstanding *Whole Foods*, the Tape Recording Policy in this case is overbroad because it potentially encompasses activity protected by Section 7, such as speeches at rallies or pickets and conversations between two union supporters. This assertion is baseless. Respondent's Tape Recording Policy clearly states its legitimate purpose which is wholly unrelated to restricting the type of activity the General Counsel identifies:

The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

(Joint Exhibit "K.").

General Counsel's theory is further flawed by its presumption that all employees engaged in Section 7 activity *also consent* to be surreptitiously recorded. Specifically, General Counsel relies upon rank speculation to conclude the rule is overbroad because there are "circumstances where there is no possibility that the participants would be chilled by such

⁶ Respondent's extensive discussion of *Whole Foods* appears on pages 18-20 of its initial brief.

recordings.” (General Counsel’s Brief, at 18). As noted in Respondent’s initial brief, permitting employees to surreptitiously record other employees under the guise that such conduct is protected under the NLRA may actually serve to *chill* employees’ Section 7 rights. As one court has noted, Connecticut, where MasTec’s Durham facility is located, recognizes the tort of “invasion of privacy based upon an unreasonable intrusion into seclusion” in cases where individuals have surreptitiously recorded face-to-face conversations. *WVIT, Inc. v. Gray*, No. 950547689, 1997 Conn. Super. LEXIS 2745 (Conn. Super. Ct. Oct. 8, 1997). The court explained that “‘it is the fact of surreptitiously monitoring a fellow employee in and of itself that constitutes the intrusion on that employee’s privacy.... The intrusion here is on the ‘person’ of the employee, irrespective of content.’” *Id.* at 5-6 Therefore, without the Tape Recording Policy in place, employees may *actually be dissuaded* from engaging in Section 7 activity because of a reasonable fear of being surreptitiously recorded. There also is simply no basis for the argument that banning tape recording at all times is unlawful. Without any authoritative support, the General Counsel chides *Whole Foods* for “opin[ing], without distinguishing the two, that because the rule at issue involved recordings and not employee solicitation, the employer was entitled to ban recordings during both work time and non-work time.” (General Counsel Brief, at 17). However, General Counsel provides no authoritative support for grafting such a temporal restriction relevant to solicitation rules to MasTec’s Tape Recording Policy.⁷ As such, the Board should adopt the ALJ’s conclusions in *Whole Foods* and apply them to the instant case.

⁷ An analogy to the copyright context is instructive as to why the General Counsel’s argument lacks merit. In *NBA v. Motorola*, 105 F.3d 841, 846-847 (2d Cir. 1997), the Second Circuit noted that organized sporting events were not copyrightable. However, the court also found that broadcasts of these same organized sporting events were copyrightable. The Second Circuit noted:

In claiming a copyright in the underlying games, the NBA relied in part on a footnote in *Baltimore Orioles, Inc. v. Major League Baseball Players Assn.*, 805 F.2d 663, 669 n.7 (7th Cir. 1986), *cert. denied*, 480 U.S. 941, 94 L. Ed. 2d 782, 107 S. Ct. 1593 (1987), which stated that the ‘players’ performances’ contain the ‘modest creativity required for copyrightability.’ However, the court

Additionally, General Counsel places more weight on two other ALJ decisions which have addressed the legality of tape recording rules than they can possibly bear. First, *Prof. Elec. Contractors of Conn., Inc.*, 34-CA-071532, 2014 NLRB LEXIS 427 (June 4, 2014) does not provide a reasoned analysis supporting its conclusion that a recording ban would unlawfully restrict employees from using evidence in employment related matters, including NLRB cases. The ALJ held:

There is, in my opinion, a legitimate conflict of principles regarding this set of rules which will require Board and Appellate Court clarification. In this case, however, I am going to come down on the side of the General Counsel and conclude that this set of rules, except to the extent that a customer explicitly prohibits photographing or videotaping on its premises, is too broad and is therefore a violation of Section 8(a)(1) of the Act.

The ALJ's decision in this case was devoid of any explanation as to why the General Counsel's position was correct.

In addition, the rules in *Prof. Elec. Contractors of Conn., Inc.* (ban on photographic, video, and audio recordings) and *Boeing Co.*, 19-CA-90932, 2014 NLRB LEXIS 365 (May 15, 2014), also cited by the General Counsel (ban on video/photographic recording), either prohibited more than just audio recordings or other forms of media altogether. These cases are inapposite because prohibitions pertaining to video recording devices are substantively different than audio recording prohibitions because photo/video recording devices are not as easy

went on to state, 'Moreover, even if the players' performances were not sufficiently creative, the players agree that the cameramen and director contribute creative labor to the telecasts.' *Id.* This last sentence indicates that the court was considering the copyrightability of telecasts -- *not the underlying games, which obviously can be played without cameras.* (Emphasis added).

The lessons from *NBA v. Motorola* respond to the General Counsel's criticism of the ALJ's decision in *Whole Foods*. As professional basketball games can be played without cameras, solicitation can occur without tape recorders. Moreover, as professional basketball teams have no copyrightable interest in their underlying games, an employer has no right to restrict solicitation during non-working times. However, professional basketball teams do have a copyrightable interest in protecting unauthorized recording of its telecasts *at all times* just like an employer has a right to ban tape recordings of conversations *at all times*, especially for the clearly legitimate reasons Respondent presents in the instant case which are discussed herein.

to surreptitiously use or conceal because an image, unlike a verbal statement, is sought to be captured. Additionally, unlike audio, which can be manually transcribed, photographs or videos cannot easily be reproduced with a simple pen and paper.

Accordingly, for the foregoing reasons, as well as those set forth in Respondent's initial brief, the General Counsel's complaint should be dismissed.

IV. RESPONDENT'S RULE PROHIBITING "ABUSIVE, THREATENING OR DEROGATORY LANGUAGE" CANNOT REASONABLY BE CONSTRUED AS PROHIBITING SECTION 7 ACTIVITY

The LP cannot be reasonably construed as prohibiting Section 7 activity. The rule is clearly intended to foster a civil workplace. Moreover, Respondent submits that employees would construe the rule in the context of the LP's surrounding language, which prohibits other egregious behavior, rather than as a prohibition of protected speech. Preliminarily, the General Counsel concedes, as she must, that the "Board has approved rules that prohibit abusive language or threatening conduct..." (General Counsel Brief, at 20). As a result, the sole dispute in this case is whether the term "derogatory," as used in the LP, is unlawful.

The Board's decision in *Southern Maryland Hospital Center*, 293 NLRB 1209, 1222 (1989), cited by the General Counsel, is not controlling. In *Southern Maryland Hospital Center*, the Board affirmed an ALJ's decision that a rule prohibiting "Malicious gossip or derogatory attacks on fellow employees, patients, physicians or hospital representatives" was unlawful. Although the ALJ in *Southern Maryland Hospital* acknowledged that a prohibition on "malicious gossip" was lawful, the ALJ did not analyze whether the lawful prohibition could serve to contextualize the purported unlawful prohibition against "derogatory attacks" such that employees would reasonably believe the rule was not intended to restrict Section 7 rights. This is not surprising because *Southern Maryland Hospital* was decided well before the Board's 2004

decision in *Lutheran Heritage Village*, discussed *supra*, which requires the Board to analyze a particular rule with appropriate context. Therefore, as noted in its initial brief, Respondent submits that the Board should take this opportunity to explicitly revisit prohibitions on “derogatory” conduct when, as is the case here, the term is placed into context with other reasonable and lawful restrictions which clearly show that employees would not construe the rule to constrict employees’ Section 7 activity.

The cases relied upon by the General Counsel to show that the LP is unlawful are all inapposite. In *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), the Board did not address a rule involving derogatory language. Instead, without evaluating the context in which the unlawful restrictions appeared, the Board found a rule which prohibited statements that would “damage the Company, defame any individual or damage any person’s reputation” to be unlawful. *Costco Wholesale Corp.* thus has no bearing on the instant case. Further, *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) did not even involve an analysis of an employer’s rule restricting derogatory statements. Rather, as the General Counsel acknowledges, that case dealt with the very different scenario of “employees’ right to communicate with the public about labor disputes.” (General Counsel Brief, at 21). Similarly, in *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (2011), the Board found a rule requiring employees to maintain harmonious work relationships to be unlawfully overbroad because the requirement was not clearly defined. Such a rule is completely dissimilar to a restriction on derogatory statements. In addition, in *Krist Oil Co.*, 328 NLRB 825, 828 (1999), the Board and ALJ assessed a different issue which is undisputedly not present in the instant case: whether a rule restricting derogatory statements was *unlawfully promulgated* in response to Section 7 activity. Finally, although the rule in *HTH Corp.*, 356 NLRB No. 182, slip op. at 26, fn. 21 (2011), *enf’d*.

693 F.3d 1051 (9th Cir. 2012) addressed derogatory statements, the ALJ assessed the rule without assessing the restriction in context. Instead, the ALJ analyzed a rule which only addressed “making...derogatory statements concerning any employee, supervisor, the hotel and/or the parent corporation.” *Id.* Notably, the ALJ noted that “the definition of derogatory remarks is unsettled” and that “prohibit[ing] certain types of derogatory comments about fellow employees or supervisors because they can negatively influence the working atmosphere” is a “legitimate purpose behind such a rule....” *Id.* Nevertheless, because the ALJ in *HTH Corp.* determined the employer conflated impermissible and permissible rationales underlying its restriction on derogatory statements – presumably because the restriction could not be read in context with other lawful prohibitions such as in the present case (i.e. “abusive and threatening”) – *HTH Corp.* is likewise distinguishable.

Finally, the General Counsel asserts that “the list of other prohibited conduct in the instant case is not restricted to ‘egregious’ conduct...[as] that list includes several relatively benign matters such as rudeness to customers, release of confidential information, and unauthorized use of company equipment.” (General Counsel Brief, at 21). The Board should reject the General Counsel’s attempt to improperly *broaden* the context such that a fair reading of the LP cannot be accomplished. The proper context is limited to “abusive and threatening,” – restrictions which, as noted above, the General Counsel acknowledges the Board has found to be lawful) – not other matters wholly unrelated to the LP.

With this proper context in mind, for the reasons set forth herein as well as its initial brief, Respondent respectfully requests that the Board conclude that the LP is lawful and dismiss the General Counsel’s complaint allegations.

V. REMEDIAL ISSUES

As of February 1, 2013, Respondent deleted the alleged unlawful language in the LP in all locations except for its Durham, Connecticut location. As a result, assuming arguendo the LP is deemed unlawful, the issue is moot as to all locations other than Durham, Connecticut. The General Counsel cites *Guardsmark, LLC*, 344 NLRB 809, 812 (2005) for the proposition that the Board has “consistently held that, where an employer’s overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy *has been or is in effect*.” (General Counsel Brief, at 22-23) (emphasis in original). Therefore, the General Counsel argues that, “even if the Board concludes that only the [LP] is unlawful, a nationwide remedy is appropriate given the Board’s language in *Guardsmark*, italicized above.” (General Counsel Brief, at 23, n. 8). However, *Guardsmark* is inapposite because, unlike the case here, there is no indication in that case that the employer rescinded an unlawful rule at all but one of its locations prior to a determination that the rule was unlawful.

Moreover, the Board in *Guardsmark* noted that “an employer may avoid imposition of a company-wide remedy by showing that ‘special circumstances’ justify a narrower remedy.” *Guardsmark*, 344 NLRB at 812. In the present case, given that Respondent has rescinded the LP at all of its locations except for Durham, Connecticut, it has demonstrated special circumstances which militate against a remedy requiring the rescission of such rule in locations other than Durham, Connecticut (a moot issue) and a nation-wide posting with respect to such rule. Even presuming the Board renders a decision finding the LP unlawful the day after briefing in this case is due (January 8, 2015), it will be nearly two years since Respondent rescinded the LP. Therefore, any such taint the LP might have had on employees’ Section 7

rights prior to February 1, 2013 will have clearly dissipated by the time the Board issues a decision in this case. Given these special circumstances, the General Counsel's requested remedy is inappropriate and unnecessary to effectuate the policies of the Act.

VI. CONCLUSION

The General Counsel's case against Respondent is meritless. It is premised on the Board's rationale in *D.R. Horton* and *Murphy Oil*, which is inconsistent with Supreme Court jurisprudence on the enforceability of class action arbitration waivers and has been expressly rejected by virtually all courts that have considered it, including the Second Circuit where this case is geographically situated. In addition, MasTec's Tape Recording Policy and LP do not reasonably tend to chill employees in the exercise of their Section 7 rights. Accordingly, the rules are lawful, and MasTec submits the instant Complaint should be dismissed and the General Counsel's requested remedial relief be denied.

Dated: January 7, 2015

Respectfully submitted,

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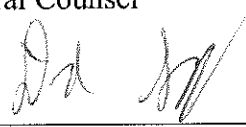
CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 7, 2015, I caused a true and correct copy of Respondent MasTec, North America Inc.'s Reply Brief to The National Labor Relations Board to be filed electronically with the National Labor Relations Board at www.nlr.gov and served upon the following counsel of record via electronic mail and Federal Express overnight mail:

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